ARMED SERVICES BOARD OF CONTRACT APPEALS

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| Appeals of -- | ) | |
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| Randolph and Company, Inc. | ) | ASBCA Nos. 52953, 52954 |
| | ) | |
| Under Contract No. DACW60-94-C-0020 | ) | |

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OPINION BY ADMINISTRATIVE JUDGE REED
ON APPELLANT'S MOTION FOR RECONSIDERATION

In our original decision, the Board decided the above-captioned appeals and five other related appeals under Contract No. DACW60-94-C-0020 (the contract). *Randolph and Company, Inc.*, ASBCA Nos. 52953, 52954, 52955, 52956, 52957, 52958, 52959, 2002 ASBCA LEXIS 127, 2002 WL 31501912 (6 November 2002). In its "Motion and Brief for Reconsideration" (app. mot. and br.), appellant timely requested that the Board reconsider its decisions in ASBCA Nos. 52953 and 52954 by which those appeals were denied.[*]

Appellant asserts that the Board incorrectly analyzed appellant's claims that the Government (1) violated FAR 16.202 thereby invalidating the contract and entitling appellant to reformation of the contract from a combination fixed-price lump sum and unit-priced estimated quantity contract to a cost-reimbursement type contract; (2) included defective specifications which hindered appellant's performance and caused it to suffer losses; and (3) failed to disclose material information that was not available to appellant

[*] The caption of appellant's motion and brief for reconsideration listed all seven appeals addressed by the Board's earlier decision; however, without objection by either party, the Board determined that the motion addressed issues and matters related to ASBCA Nos. 52953 and 52954 only. Docketing Order (11 December 2002).

which, if known, would have affected whether the contract would have been made and how it would have been performed. The Government responded in opposition to the motion.

A motion for reconsideration is evaluated "against the familiar standard of whether the motion is 'based upon any newly discovered evidence or legal theories which the Board failed to consider in formulating its original decision.' " *Danac, Inc.*, ASBCA No. 33394, 98-1 BCA ¶ 29,454 at 146,219, *quoting Sauer Inc.*, ASBCA No. 39372, 96-2 BCA ¶ 28,620 at 142,897.

Alleged Violation of FAR 16.202

The text of § "(A)" of appellant's motion and brief for reconsideration, at 1-6, is a verbatim repetition of the text of appellant's argument at § "(1)" of appellant's post-hearing brief submitted in anticipation of our earlier decision (app. br. at 20-25), with one exception. At the conclusion of the third paragraph of § (A) of the motion and brief for reconsideration, appellant adds one sentence: "Therefore, a fixed price contract was not suitable and should not have been utilized" (app. mot. and br. at 3). We view this added sentence as a restatement in part or at most, an augmentation of the equitable reformation relief requested by appellant in its earlier post-hearing brief and now again in the motion and brief, *i.e.*, "violation of [FAR 16.202 by the Government] invalidates the contract and justifies the Board in reforming the contract to a cost-reimbursement type contract." (App. br. at 24; app. mot. and br. at 6)

In our earlier decision, we considered appellant's equitable reformation argument. *Randolph*, slip op. at 32. Among other arguments, appellant contended for reformation of the contract to a cost-type contract because the contracting officer (CO) allegedly improperly selected a contract type with fixed lump sum and unit prices. We held that the selection of contract type was a matter within the CO's discretion. Even if the CO abused her discretion in that regard, which we did not find, such a determination would not provide appellant the remedy sought. A very recent decision by our appellate authority in this case was cited in support of our determination. *American Tel. and Tel. Co. v. United States*, 307 F.3d 1374, 1379-80 (Fed. Cir. 2002). Appellant neither cites that decision nor attempts to distinguish it in its motion and brief for reconsideration. It was not necessary to analyze appellant's argument more closely given the authoritative and dispositive nature of the cited court decision.

Appellant is not entitled to reformation of the contract to a cost-reimbursement type. We affirm our earlier decision.

Alleged Defective Specifications

Section "(B)" of appellant's motion and brief, at 6-9, is a verbatim repetition of appellant's argument at § "(2)" of appellant's post-hearing brief at 25-28, with the exception

that the motion and brief omits the second and third paragraphs of the material contained within the cited section of the post-hearing brief.

Appellant presents no newly discovered evidence or legal theories which we failed to consider in formulating our original decision. Therefore, we affirm our original decision.

The Government Allegedly Failed to Provide Material Information in its Possession

The text of § "(C)" of appellant's motion and brief, at 9-13, is a verbatim repetition of the text of appellant's argument at § "(3)" of appellant's post-hearing brief at 28-33, with additions. The additions (1) challenge the Board's Finding of Fact No. 1 and note 4 of our earlier decision concerning whether the Government's design calculation of 0.2 foot overall subsidence of the site per year, including the so-called failure area, was correct, (2) highlight the alleged significance of the approximate one foot subsidence within weeks after a section of the dike was raised as opposed to the average subsidence within a year as expressed in the contract specifications, and (3) suggests that the Board incorrectly placed the burden on appellant to learn of allegedly withheld information rather than properly requiring the Government to divulge material information.

No new evidence is presented by appellant that would validate appellant's challenge of the Board's Finding 1 and note 4 of the decision. *Randolph*, slip op. at 2-3, 40. The finding as footnoted is supported by the record.

Concerning the subsidence of the so-called failure area by about one foot to one and one-half feet within a short time after raising that portion of the dike in 1990, appellant asks the Board to focus on one event to the exclusion of the full known history of the dike as reasonably summarized by the Government in the specifications. The contract technical provisions, at ¶¶ 4.1, 4.2.1, 4.2.2, and 4.2.4, make clear that the dike is "founded on a marsh type base, which has relatively low strength and high water content," that "increases to the dikes' weight . . . may cause settlement, bearing capacity failure, or localized slope failures," that the "underlying soil [needs] time to consolidate and gain strength under the load," that "materials from which the dikes are to be constructed also have low shear strengths and in general must be placed in several lifts, with each lift being allowed to develop strength through consolidation, before the required dike height can be obtained," that "side slopes flatter than those indicated may be necessary for stability and . . . to offset dike and foundation settlement," that low ground pressure construction equipment is required, and that the borrow area is "wet (even in hot, dry weather) . . . ." *Randolph*, slip op. at 10-12 (Finding 23).

Rather than limit the scope of the cautionary language about the possibility of sudden subsidence to about 9% of the lineal reach of the dike, as appellant suggests would have been more appropriate, the Government's specifications told prospective offerors that

such conditions prevailed on every portion of the dike and throughout the borrow area. Randolph had ample experience to understand the warnings set out by the Government in the technical provisions of the contract. Further, there is no proof of extra costs accrued by appellant based on the limited sudden subsidence that did occur at locations other than the so-called failure area. Finally, the evidence supports our finding that appellant's construction practices exacerbated the effects warned of by the Government. *Randolph*, slip op. at 29-30.

The Board did not improperly place on appellant the burden of obtaining information that the Government should have provided. Instead, we concluded that the Government met its responsibility by providing the salient information and that appellant either failed to heed the information placed before it or failed to factor the information into its construction practices on the job.

No new evidence or legal theory provides any basis on which to change our earlier decision concerning superior knowledge. Accordingly, it is affirmed.

SUMMARY

Having considered appellant's enhancements of its earlier arguments and having reconsidered our earlier decision, it is hereby affirmed.

Dated: 13 January 2003

STEVEN L. REED
Administrative Judge
Armed Services Board
of Contract Appeals

(Signatures continue)

I concur

I concur

MARK N. STEMPLER
Administrative Judge
Acting Chairman
Armed Services Board
of Contract Appeals

EUNICE W. THOMAS
Administrative Judge
Vice Chairman
Armed Services Board
of Contract Appeals

I certify that the foregoing is a true copy of the Opinion and Decision of the Armed Services Board of Contract Appeals in ASBCA Nos. 52953 and 52954, Appeals of Randolph and Company, Inc., rendered in conformance with the Board's Charter.

Dated:

EDWARD S. ADAMKEWICZ
Recorder, Armed Services
Board of Contract Appeals